No. 83-1100

In the Supreme Court
OF THE
United States

GARY LEE BATTAGLIA,
Petitioner,

vs.

THE COMMITTEE OF BAR EXAMINERS OF THE
STATE BAR OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

ALVIN H. GOLDSTEIN, JR.
GOLDSTEIN & PHILLIPS
A PROFESSIONAL CORPORATION
Three Embarcadero Center,
Suite 2280
San Francisco, CA 94111
Telephone: (415) 981-8855
Attorneys for Petitioner

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

1. Whether California's refusal to provide judicial review of an administrative agency's denial of certification for admission to the practice of law constitutes a deprivation of liberty without due process of law.

2. Whether petitioner is denied equal protection of the law when the State Supreme Court refuses to apply, to his case, California law which requires independent judicial examination of the record and a weighing of the evidence relied upon by the agency denying certification.

PARTIES

The party filing this petition is an applicant for admission to the California Bar. The respondent Committee of Bar Examiners is appointed by the Board of Governors of the State Bar of California. The Supreme Court of California exercises supervisory power over The Committee of Bar Examiners and has original and exclusive jurisdiction over all judicial disputes relating to Bar admission. Thus, The Supreme Court of California and/or the State of California, although not named in the caption, are technical parties to this proceeding.

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No.

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Petitioner Gary Lee Battaglia respectfully files this Petition For Writ of Certiorari to the Supreme Court of the State of California.

OPINIONS AND ORDERS OF COURTS AND ADMINISTRATIVE AGENCIES BELOW

On November 22, 1982, a hearing panel of the State Bar Court, an administrative tribunal, filed a decision recommending that petitioner "*should be* certified to the practice of law in the State of California forthwith." Emphasis added. (Exhibit "B" to Petition for Review, lodged separately.) On May 20, 1983, the Committee of Bar Examiners of the State Bar of California concluded that petitioner "*shall not be* certified to the Supreme Court of California for admission to practice . . ." (Exhibit "C" to Petition for Review, lodged separately.) On July 22, 1983,

petitioner filed with the State Supreme Court a Petition for Review, which was summarily denied, without opinion, by order dated September 8, 1983. A Petition for Reconsideration filed September 21, 1983, was denied, without opinion, by order dated October 5, 1983. The Petition for Review, Order Denying Review, Petition for Reconsideration, and Order Denying Rehearing are in the Appendix to this petition. The exhibits referred to in the Petition for Writ of Review, "A" through "D", are lodged with the Clerk of the Supreme Court. In compliance with the Rules, the briefs in support of the petitions have not been filed or lodged.

JURISDICTION

The date of the order sought to be reviewed is September 21, 1983. The date of the order denying rehearing (actually "reconsideration") is October 5, 1983. The statutory provision conferring jurisdiction on this Court to review the judgment by writ of certiorari is 28 U.S.C. 1257, subdivision 3.

STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, as follows: "nor shall any person . . . be deprived of . . . liberty . . . without due process of law . . .".

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, as follows: "No State shall make or enforce any law which shall abridge the privileges of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Business and Professions Code Section 6046, enacted 1939, empowers the Committee of Bar Examiners "(a) To examine all applicants for admission to practice law; (b) To administer the requirements for admission to practice; (c) To certify to the Supreme Court for admission those applicants who fulfill the requirements . . ." Section 6066, enacted 1939, provides, in pertinent part, that: "Any person refused certification to the Supreme Court for admission to practice may have [that action] reviewed by the Supreme Court, in accordance with the procedure prescribed by the Court."

Rules Regulating Admission to Practice Law in California, promulgated by the Board of Governors of the State Bar of California provide, inter alia, that "any person refused certification to the Supreme Court for admission to practice may have the action of the Committee reviewed by the Supreme Court in accordance with the procedure prescribed therefore. Rule I, Section 11.

California Rules of Court provide, inter alia, as follows: "a petition to the Supreme Court to review any . . . action of the [Committee of Bar Examiners] . . . shall be filed within 60 days after written notice of the action complained of is mailed . . . the petition shall be verified, shall specify the grounds relied on and shall be accompanied by the petitioner's brief and proof of service on The State Bar . . . Within ten (10) days after service . . . The State Bar may serve and file an answer and brief. Within five (5) days after service of the answer, the petitioner may serve and file a reply. *If a review is ordered by the Supreme Court,* the State Bar, within 45 days after the filing of the order, may serve and file a supplemental

brief. Within 15 days after service of such brief the petitioner may file a reply brief . . .". Rule 952(c), emphasis added. [Rule 59(b) as renumbered and amended effective October 1, 1973; previously amended effective July 1, 1968.]

STATEMENT OF THE CASE

The instant petition results from an administrative denial of certification for admission to practice law and subsequent refusal of the California Supreme Court, which exercises original and exclusive jurisdiction over such matters, to provide judicial review.

On December 28, 1981, petitioner was notified that the Committee of Bar Examiners had referred his Bar application to the State Bar Court, an administrative tribunal of the State Bar of California. (See Exhibit "A" to Petition for Review, lodged separately.) On November 22, 1982, the State Bar Court, after a lengthy hearing, filed its "Findings of Fact and Recommendation", concluding that "the applicant *should be* certified to practice law in the State of California forthwith." (Emphasis added, see Exhibit "B" to Petition for Review, lodged separately.) On May 20, 1983, the Committee of Bar Examiners, after a perfunctory hearing, rejected the State Bar Court's recommendation and concluded that petitioner *"shall not be* certified to the Supreme Court of the State of California for admission to practice law . . .". (Emphasis added, see Exhibit "D" to Petition for Review lodged separately.)[1]

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[1]The Committee's reversal of the State Bar Court's recommendation was purportedly based upon its review of a voluminous transcript of hearings before the State Bar Court which transpired over a period of approximately four months, during which the Bar Court heard 26 witnesses and received over 95 exhibits along with written briefs and oral argument. The Committee's subsequent "hearing" was conducted on February 11, 1983 (see Exhibit "C" attached to

Petitioner sought judicial review by taking the only course permitted under California law. He filed a Petition for Review. (See Appendix.) Cal.B&P.Code § 6066; Cal.R. of Court 952(c); Rules Regulating Admission I, § 11. The Petition was summarily denied without opinion. See Appendix. California Rules of Court 56-60 relating to original proceedings do not provide for transmittal of the underlying administrative record to the Supreme Court. A Petition for Reconsideration was also denied in the form of an order, erroneously styled as an "Order Denying Rehearing". (See Appendix.)

This Court has held that "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Schware v. Board of Bar Examiners,* 353 U.S. 232, 238-239 (1956). This petitioner first sought

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Petition for Review, lodged separately), after which the Committee *immediately* denied certification. That proceeding had to be reopened, at petitioner's request, because the Committee had not followed its own rules, i.e., "for the exclusive purpose of considering those portions of the record which were not before the Committee at the time of the February 11, 1983 hearing." (Exhibit "D" to Petition for Review, lodged separately.) No provision was made for petitioner's attendance at the "reopened" hearing at which time the Committee corrected its irregularity and ratified its previous action. The nature of Committee "hearings", such as the one attended by petitioner on February 11, 1983, (Exhibit "C" to Petition for Review, lodged separately) is aptly described by the California Supreme Court in *Hightower v. State Bar,* 34 Cal.3d 150, 153 (1983): ". . . [O]ral argument would be limited to 15 minutes for each side with 5 minutes for rebuttal, and . . . [petitioner] would be permitted to make a statement under oath but . . . the total time limit would be 20 minutes for him and his counsel. There was no provision for testimony by witnesses." Such was the proceeding at which the Committee of Bar Examiners reversed the action of the State Bar Court that had heard testimony over many months.

access to the judicial process to examine the "*reasons*" for his exclusion. Having been denied judicial review, he asks this Court to examine the "*manner*" of his exclusion. In a footnote in *Schware*, this Court points out that, regardless of whether the practice of law is a "right" or a "privilege", an applicant cannot be denied admission except for valid reasons. "Certainly the practice of law is not a matter of the State's grace." Id. n.5 at 239.

In *Konigsberg v. State Bar of California*, 353 U.S. 252 (1956), this Court emphasizes that exclusion from the practice of law adversely affects an applicant's livelihood noting that "[t]his deprivation has grave consequences for a man who has spent years of study and a great deal of money in preparing to be a lawyer." 353 U.S. 257-258. The identification of a substantial and fundamental interest, i.e., the opportunity to practice one's chosen profession, has due process implications if judicial review is denied. See *Boddie v. Connecticut*, 401 U.S. 371, 375 (1971). What is at stake here is well expressed by Mr. Justice Douglas dissenting in *Barsky v. Board of Regents*, 347 U.S. 442, 472 (1953):

> The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. The American ideal was stated by Emerson in his essay on *Politics*, "A man has a right to be employed, to be trusted, to be loved, to be revered." It does men little good to stay alive, and free and propertied, if they cannot work. To work means to eat. It also means to live. For many, it would be better to work in jail, than to sit idle on the curb. The great values of freedom are in the opportunities afforded man to press to new horizons,

> to pit his strength against the forces of nature, to match skills with his fellow man.

In *Konigsberg*, supra, this Court assumes that the California scheme mandates a judicial review that encompasses an examination of the facts and a weighing of the evidence; that the California Supreme Court "exercises original jurisdiction and *is not restricted to the limited review made by an appellate court.*" 353 U.S. 254, emphasis added. Mr. Justice Black directs attention to the California court's own pronouncement that *it* "has the inherent power and authority to admit an applicant to practice law [and that] the recommendation of the Board of Bar Governors is advisory only. . . . [*T*]*he final determination in all these matters rests with this Court and its powers in that regard are plenary and its judgment conclusive.*" 353 U.S. 254 (emphasis added), quoting from *In re Lacey*, 11 Cal.2d 699, 701 (1938).

After *Konigsberg* the California Supreme Court spoke in even stronger terms respecting its responsibilities in cases involving denial of certification to practice law. In *Siegel v. Committee of Bar Examiners* 10 Cal.3d 156 (1973)[2]:

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[2]The California Supreme Court observes in *Siegel* that deference is given to the findings and recommendations of the body that "observe[d] the demeanor of witnesses and the character of their testimony". 10 Cal.3d 173. To apply this principle to the instant case, the California court would have been required to examine the transcript of proceedings before the State Bar Court and give deference to *its findings* for it was that body which heard the witnesses, judged their credibility and weighed the evidence, *not the Committee of Bar Examiners*. The State Bar Court recommended petitioner's admission "forthwith". Thus, the State court's denial of review here is even more egregious than in *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1962).

> *In accordance with our duty to undertake an independent examination of the evidence in cases of this kind* (citations omitted), *we proceed to a consideration of the record.* 10 Cal.3d 160, emphasis added.
>
> • • •
>
> The legal rules and principles which govern our inquiry in matters of this nature are well settled. Although the findings of the Committee are entitled to and accorded great weight, we are not bound by them. Rather *this Court independently examines and weighs the evidence and passes upon its sufficiency.* The applicant bears the burden of showing that the Committee's findings are not supported by the evidence or "that its decision or action is erroneous, or unlawful," *but all reasonable doubts are to be resolved in his favor.* 10 Cal.3d 173

In *Hallinan v. Committee of Bar Examiners,* 65 Cal.2d 447 (1966), the California Supreme Court holds that, in both disciplinary and admission cases, it "examines and weighs the evidence and passes upon its sufficiency [and that] *any reasonable doubts encountered in the making of such an examination should be resolved in favor of the accused.*" 65 Cal.2d 451. Emphasis added. "We examine the evidence and make our own determination as to its sufficiency, resolving reasonable doubts in favor of petitioner." *Hightower v. State Bar,* 34 Cal.3d 150, 156 (1983). In *Hall v. Committee of Bar Examiners,* 25 Cal.3d 730 (1979) the State court emphasizes the *mandatory* nature of its review:

> The applicant bears the burden of proving his good moral character (citation omitted). Once the applicant has furnished enough evidence of good character to establish a prima facie case, the Committee may

> attempt to rebut that showing. (Citation omitted.) We turn, then, to the independent examination of the record *which we must undertake in reviewing a certification denial,* to determine whether applicant Hall has made his prima facie showing and if so, whether the record contains sufficient evidence of bad moral character to rebut that showing (citations omitted). 25 Cal.3d 734, emphasis added.

Thus, the California Supreme Court subsequent to the 1939 enactment of B&P Code Section 6066 and Rule of Court 952(c), [1968, 1973], has clearly, unequivocally and repeatedly, announced that California law requires it to make an independent examination of the record and to weigh the evidence following a denial of certification by the Committee of Bar Examiners. See, for example, *Hall v. Committee of Bar Examiners,* supra, 25 Cal.3d at 734 decided in 1979 citing *Konigsberg,* supra, *Siegel,* supra, and *Hallinan,* supra, followed in *Martin B. v. CBE* 33 Cal.3d 717 (1983); *Hightower v. State Bar,* supra, 34 Cal.3d 150, 156 (1983). That such review was not afforded petitioner in the instant case amounts to both a denial of procedural due process and equal protection of the law. Cf. *In re Armstrong,* 126 Cal.App.3d 565, 569 (1981).[3]

Refusal of the California Supreme Court to grant judicial review to petitioner results in an invidious discrimination.

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[3] In *Armstrong,* the California appellate court observed: "Although the United States Supreme Court has never held that States are required to provide appellate review, 'once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts' (citations omitted). * * * The right of 'equal access' to the courts rests upon the 'Constitutional guarantees of due process and equal protection. . . .'" 126 Cal.App. 3d 569.

This Court has stated:

> "Due process" emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. "Equal protection," on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable." *Ross v. Moffitt*, 417 U.S. 600, 609 (1973).

Pursuant to the requirements of Supreme Court Rule 21.1(h), we assert that the Petition for Review (see Appendix) filed in the Supreme Court of the State of California raises federal constitutional questions as follows:

> The action of the Committee is arbitrary and capricious and denies due process of law to petitioner. Par. IX
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> • • •
>
> There is no substantial evidence to support the conclusions of respondent [Committee of Bar Examiners] and the proceedings upon which the Committee's action is based are fundamentally unfair. Par IX
>
> • • •
>
> Said findings . . . are vague, indefinite, ambiguous, and uncertain and without evidentiary support, and manifest the arbitrary and capricious nature of respondent's refusal to certify petition . . . for admission to practice law in the State of California. Par. X
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> • • •
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> The Committee of Bar Examiners arbitrarily and capriciously refuses to apply statutory and case law to the facts of this case. Par. XI
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> • • •
>
> The deprivation of substantial rights implicit in refusing to allow petitioner to enter the profession for

> which he has been trained . . . deny to petitioner equal protection and due process of law. Par. XI

Upon receipt of the order denying review, petitioner filed a Petition for Reconsideration (see Appendix) which asserted federal constitutional questions as follows:

> Petitioner has been refused judicial review of the final actions of an administrative agency over which this Court exercises original jurisdiction, thereby denying to petitioner a judicial remedy of any kind. Par. I
>
> * * *
>
> The only agency to conduct a due process hearing recommended that petitioner be certified forthwith for admission to the practice of law . . . The Committee of Bar Examiners overturned that determination without providing a hearing that comports with due process requirements and without employing any discernible standard of review. Par. II
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> * * *
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> Since this Court has original jurisdiction in all matters related to Bar admission, this Court is the only *judicial* body empowered to review the record and consider petitioner's assertions that he has been denied due process and equal protection of the law. Par. III
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> * * *
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> Petitioner passed the California bar examination in 1978. Since that time, *no* court has reviewed the Committee of Bar Examiners' refusal to certify him for admission. Par. IV
>
> * * *
>
> The procedure adopted by the Committee of Bar Examiners and its failure to employ any standard of review denies to petitioner the benefit of this Court's

rule that all reasonable doubts should be resolved in favor of an applicant. Par. V

* * *

This Court by refusing review of the actions of the Committee of Bar Examiners denies petitioner the opportunity to have a judicial officer apply the reasonable doubt standard to the record of this case. Par. VI

* * *

In the five years that have elapsed since petitioner passed the California bar examination, he has been denied by the Committee of Bar Examiners the opportunity to practice the profession for which he has been trained, and has not had the benefit of judicial review by any court, despite [his] allegations . . . that he has been subjected to arbitrary and capricious treatment by a non-judicial, administrative agency of the State. Par. XIII

AMPLIFICATION OF REASONS FOR ALLOWANCE OF THE WRIT OF CERTIORARI

The California Supreme Court, by summarily denying the Petition for Writ of Review, has adopted the same discretionary standard that this Court would apply in considering certiorari, but in so doing so has denied to one of its citizens "initial access to the courts." Douglas J. dissenting in *Ortwein v. Schwab*, 410 U.S. 656, 662 (1973). That we are concerned with a "fundamental interest," which this Court found lacking in *Ortwein*, is firmly established by *Schware*, supra, and *Konigsberg I*, supra. In those cases, this Court holds that "A State cannot exclude a person from the practice of law or from any other occupation in a manner . . . that contravene[s] the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Schware v. Board of Bar Examiners*, supra, 353 U.S. 238-239.

In the context of administrative mandamus, California courts have recognized that without an examination of the record and a weighing of the evidence, judicial review of an administrative decision becomes an arid and meaningless ritual. *Strumsky v. San Diego County Employees Retirement Association*, 11 Cal.3d 28 (1974). In *Strumsky*, the State Supreme Court stated:

> The essence to be distilled is this: When an administrative decision affects a right which has been legitimately acquired or is otherwise "vested," and when that right is of a fundamental nature from the standpoint of its economic aspect or its "effect . . . in human terms and the importance . . . to the individual in the life situation," then a full and independent *judicial* review of that decision is indicated because "[t]he abrogation of the right is too important to the individual to relegate it to exclusive administrative extinction." 11 Cal.3d 34, emphasis the Court's.

Here, of course, petitioner's rights as defined in *Schware* and *Konigsberg I* have been extinguished without any judicial review of the administrative record upon which the denial was based.[4]

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[4]In *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1962), this Court held that a Character Committee's denial of an application for admission, followed by a petition to the Appellate Division, which was denied without opinion, amounted to a denial of due process in that the petitioner had been denied admission to the Bar without a hearing before either the Character Committee or the Appellate Division. Willner had been denied a hearing before *both* the administrative body and the court, but *Willner* is this case turned on its head. Here, the administrative body that heard the evidence recommended admission, *after which* a second administrative body, which did not hear the evidence, denied admission and the California Supreme Court denied judicial review. Thus, this petitioner (Battaglia) is in no different constitutional position than

The central issue confronting the Court in the instant case was raised in *Ortwein v. Schwab*, supra, 410 U.S. 656. However, in a per curiam opinion, the five-justice majority declined to reach that issue, i.e. whether judicial review of administrative action is compelled as a matter of due process of law, holding that *Ortwein* presented no question of a fundamental interest or suspect classification and, therefore, was controlled by *United States v. Kras*, 409 U.S. 434 (1973), rather than *Boddie v. Connecticut*, supra, 401 U.S. 371.

Mr. Justice Douglas, dissenting, points out that, while the Court has recognized that due process does not require a State to provide an appellate system, *Ortwein* is not concerned with appellate review but with "*initial access* to the courts for review of an adverse administrative determination." 410 U.S. 662, emphasis by Douglas J. We think the emphasis here should be on that point. On that score, the language of Justice Douglas extrapolated from his dissent in *Ortwein* seems to represent prevailing law:

> Access to the courts before a person is deprived of a valuable interest, at least with respect to questions of law, seems to be the essence of due process. 410 U.S. 662.

Willner. Battaglia had his hearing before an administrative body that recommended that he be admitted. The denial of admission came from a second administrative agency that provided only the most perfunctory hearing (see *Hightower v. State Bar*, supra, 34 Cal.3d at 153) and it is this second recommendation that the State Supreme Court declines to review. The language of this Court, quoted in *Willner*, is particularly apt here:

> The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps. 373 U.S. 105 quoting from *Morgan v. United States*, 304 U.S. 1, 20.

"Token access", says Justice Douglas, "cannot satisfy the requirements of due process." 410 U.S. 662-663. Mr. Justice Marshall, also dissenting in *Ortwein*, writes as follows:

> As my Brother Douglas demonstrates, it is at very least doubtful that the Due Process Clause permits a State to shield an administrative agency from all judicial review when that agency acts to revoke a benefit previously granted. I share the view of Mr. Justice Brandeis that "[t]he supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly." (Citations omitted.) That opportunity was denied in this case and important benefits were thereby taken from appellants without affording them a chance to contest the legality of the taking in a court of law. 410 U.S. 665-666.

Here, we are concerned with a fundamental and substantial right involving one's livelihood and chosen profession rather than "a benefit previously granted" but, as *Schware* and *Konigsberg I* teach, the principle is the same.

CONCLUSION

This Petition For Writ of Certiorari satisfies the two considerations set out in this Court's Rule 17.1(c). First and foremost, the Supreme Court of the State of California has decided a federal question in a way that conflicts with applicable decisions of this Court and secondly, the California Supreme Court has, *sub silentio*, decided an important question of federal law which should be settled by this Court.

While California statutes and rules may imply that judicial review of administrative denial of Bar admission is

discretionary, California law, as defined by the State Supreme Court in accord with due process requirements, consistently rejects discretion in favor of a mandatory duty independently to examine and weigh the evidence and resolve all reasonable doubt in favor of an applicant. *Hall v. Committee of Bar Examiners,* supra, 25 Cal.3d at 734; *Siegel v. Committee of Bar Examiners,* supra, 10 Cal.3d at 160, 173; *Hallinan v. Committee of Bar Examiners,* supra, 65 Cal.2d at 451; *Hightower v. State Bar,* supra, 34 Cal.3d at 165. In the words of the California Supreme Court. "Freedom from arbitrary adjudicative procedures is a substantive element of one's liberty." *People v. Ramirez,* 25 Cal.3d 260, 268 (1979). This principle is carried out in California case law relating to Bar admissions. The State court's failure to apply it here has resulted in a denial of due process and equal protection of law.

For the reasons set forth above, the Petition For Writ of Certiorari to The Supreme Court of The State of California should be granted.

DATED: December 29, 1983.

Respectfully submitted,
GOLDSTEIN & PHILLIPS

By ALVIN H. GOLDSTEIN, JR.
Attorneys for Petitioners

No. _____

IN THE SUPREME COURT

OF THE

UNITED STATES

GARY LEE BATTAGLIA

Petitioner,

vs.

THE COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA

Respondent.

APPENDIX TO WRIT OF CERTIORARI

ALVIN H. GOLDSTEIN, JR.
GOLDSTEIN & PHILLIPS
A Professional Corporation
Three Embarcadero Center
Suite 2280
San Francisco, Calif. 94111
Telephone: (415) 981-8855

Attorneys for Petitioner

ORDER DENYING WRIT OF REVIEW

S.F. No. 24593

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

IN BANK.

GARY LEE BATTAGLIA

v.

COMMITTEE OF BAR EXAMINERS

Petition for writ of review DENIED.

BIRD

CHIEF JUSTICE

(FILED: September 8, 1983)

ORDER DENYING REHEARING

S.F. No. 24593

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

IN BANK

BATTAGLIA

v.

COMMITTEE OF BAR EXAMINERS

Petition for rehearing DENIED.

BIRD

CHIEF JUSTICE

(FILED: October 5, 1983)

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

GARY LEE BATTAGLIA, Petitioner, v. THE COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA, Respondent.	)	NO. _____

PETITION FOR REVIEW

I

Petitioner graduated from law school in May 1977, and in December 1978, was notified by respondent Committee of Bar Examiners ("Committee" or "CBE") that he had passed the bar examination. In April 1979, respondent, through the Division of Trial Counsel, initiated proceedings to prevent petitioner's admission to the Bar. Thereafter, through the present time,

despite the fact that all questioned conduct occurred during the period 1976 to 1978, and despite a recommendation of the State Bar Court in 1982, that petitioner be admitted, respondent has persistently and unlawfully refused to certify petitioner for admission to the Bar.

II

In June 1979, a hearing panel of the State Bar Court recommended to the Committee that petitioner not be admitted to practice law. In December 1979, the Committee modified the findings of the panel, and for good cause shown, shortened the usual time for reapplication from two years to one year. (Rule X, §104(a), Rules Regulating Admission to Practice Law in California.)

III

In January 1981, petitioner reapplied for admission to practice law. Eleven months later, in December 1981, respondent served a Notice of Hearing, thereby commencing the proceedings from which petitioner seeks review. (Notice of Hearing dated December 28, 1981 attached hereto as Exhibit "A.") Thereafter, from March 22, 1982 to July 9, 1982, evidentiary hearings were conducted during which twenty-six witnesses testified and ninety-five exhibits, including a transcript of the 1979 proceedings, were received.

IV

On November 17, 1982, the State Bar Court concluded: "The Applicant should be certified to practice law in the State of California forthwith." (Findings of Fact and Recommendation attached hereto as Exhibit "B"; emphasis added.)

V

Thereafter, the Committee granted the application of the Division of Trial Counsel for a hearing. Petitioner appeared before the Committee on February 11, 1983, was placed under oath, questioned by Committee members, and allowed twenty minutes to argue against the unsworn assertions of the Division of Trial Counsel, many of which were inaccurate and unsupportable. On February 15, 1983, respondent notified petitioner that it had determined on February 11 that petitioner was not qualified for admission to practice law and would not be certified for admission, thus reversing the recommendation of the State Bar Court. A transcript of the February 11, 1983 proceeding before the Committee is attached hereto as Exhibit "C."

VI

Thereafter, petitioner discovered that at the time of respondent's decision on February 11, 1983, the Committee had not complied with Rule X, Section 103(f), Rules Regulating Admission to Practice Law in California, requiring preparation of a reporter's transcript of the State Bar Court proceedings. Respondent's decision of February 11, 1983 was made without access to or review of the testimony of fourteen witnesses, many of whom had testified on the subject of petitioner's character.

VII

On February 16, 1983, petitioner filed a written motion requesting that the Committee vacate its determination of February 11, 1983 and reopen the hearing. On April 1, 1983, petitioner was notified that the Committee had granted the motion

to reopen the hearing "for the exclusive purpose of completing the record by reviewing those portions of the record which were not before the Committee at the time of the [February 11] hearing." Petitioner was allowed ten days to file a brief related exclusively to the material completing the record and the State Bar was allowed ten days to respond. Petitioner's brief was duly filed. There was no response from the State Bar. No provision was made for the further testimony of petitioner.

VIII

On May 4, 1983, petitioner was notified by respondent that, on April 30, 1983, the Committee again determined that he did not qualify for admission to practice law and would not be certified for admission. On May 25, 1983, petitioner was served "Findings and Conclusion" of

the Committee (Exhibit "D" attached hereto) overturning the "Findings of Fact and Recommendation" of the State Bar Court (Exhibit "B"). This Petition for Review is pursuant to California Rules of Court, Rule 952(c); Rules Regulating Admission to Practice Law in California, Rule I, §§2, 11; California Business and Professions Code, §6066.

IX

The action of the Committee is arbitrary and capricious and denies due process of law to petitioner. There is no substantial evidence to support the conclusions of respondent and the proceedings upon which the Committee's action is based are fundamentally unfair. The Committee did not judge the credibility of witnesses that appeared before the State Bar Court, did not weigh the evidence, did not receive additional evidence and did not

employ the substantial evidence rule of any discernible standard of review. Petitioner is denied certification for admission despite a finding of the State Bar Court which did judge the credibility of witnesses and weigh the evidence.

X

CBE findings 7, 8, 9, 10 and 11 (Exhibit "D") are the only substantive findings of the Committee relating to character and they are insufficient as a matter of law to support the respondent's refusal. Moreover, said findings are not supported by any substantial evidence, or any evidence whatsoever. Said findings, particularly 9, 10 and 11, are vague, indefinite, ambiguous and uncertain and without evidentiary support, and manifest the arbitrary and capricious nature of respondent's refusal to certify petitioner

to this Court for admission to practice law in the State of California.

XI

The Committee of Bar Examiners arbitrarily and capriciously refuses to apply statutory and case law to the facts of this case. The deprivation of substantial rights, implicit in refusing to allow petitioner to enter the profession for which he has been trained, despite the fact that he has qualified for the practice of law, and despite the fact that persons in the community in which he resides, and would practice law, consider him to be a person of good moral character, deny to petitioner equal protection and due process of law. Petitioner has no other remedy available to him save this Petition for Review.

XII

Petitioner presently possesses good moral character, has not committed acts involving moral turpitude, and is fully qualified to practice law. This Court is respectfully requested to review the proceedings conducted by respondent, to set the matter for hearing, and to order that petitioner be certified to this Court for admission to the practice of law.

DATED: July 21, 1983.

Respectfully submitted,

GOLDSTEIN & PHILLIPS

By _____
ALVIN H. GOLDSTEIN, JR.

Attorneys for
Petitioner

V E R I F I C A T I O N

I, GARY LEE BATTAGLIA, am the Petitioner in this proceeding. I have read the foregoing PETITION FOR REVIEW and know the contents thereof. The same is true of my own knowledge.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on July 21, 1983, at San Francisco, California.

(Signed)

GARY LEE BATTAGLIA

ALL EXHIBITS REFERRED TO IN THE

PETITION FOR REVIEW

- EXHIBITS A, B, C AND D -

HAVE BEEN LODGED SEPARATELY WITH THE

CLERK OF THE SUPREME COURT

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

GARY LEE BATTAGLIA, Petitioner, v. THE COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA, Respondent.	)	NO. 24593

PETITION FOR RECONSIDERATION

1. Petitioner has been refused judicial review of the final actions of an administrative agency over which this Court exercises original jurisdiction, thereby denying to petitioner a judicial remedy of any kind. (See Exhibit A attached.)

2. The only agency (the State Bar Court) to conduct a due process hearing recommended that petitioner be certified

forthwith for admission to the practice of law. (See Exhibit B to Petition for Review.) The Committee of Bar Examiners overturned that determination without providing a hearing that comports with due process requirements and without employing any discernible standard of review.

3. Since this Court has original jurisdiction in all matters related to Bar admission, this Court is the only judicial body empowered to review the record and consider petitioner's assertions that he has been denied due process and equal protection of the law.

4. Petitioner passed the California Bar Examination in 1978. Since that time no court has reviewed the Committee of Bar Examiners' refusal to certify him for admission.

5. The procedure adopted by the Committee of Bar Examiners and its failure to employ any standard of review, denies to

petitioner the benefit of this Court's rule that all reasonable doubts should be resolved in favor of an applicant. Hallinan v. Committee of Bar Examiners, 65 Cal.2d 447, 451 (1966).

6. This Court, by refusing review of the actions of the Committee of Bar Examiners', denies petitioner the opportunity to have a judicial officer apply the reasonable doubt standard to the record of this case.

7. The operative findings of the Committee of Bar Examiners, i.e., that petitioner was "less than candid"; that his "judgment in various financial matters continues to be poor"; and that he "had no reasonable belief that he could pay for [VISA] credit card purchases at a specific time", are either unsupported by any substantial evidence, or subject to the reasonable doubt standard, or both, and

petitioner is entitled to judicial review of those findings.

8. In the five years that have elapsed since petitioner passed the California Bar Examination, he has been denied by the Committee of Bar Examiners the opportunity to practice the profession for which he has been trained, and has not had the benefit of judicial review by any court, despite petitioner's allegations as set forth in the petition for review that he has been subjected to arbitrary and capricious treatment by a non-judicial administrative agency of the State.

9. Petitioner respectfully requests reconsideration and asks that this Court review the actions of respondent which

unlawfully refuses certification for admission to the practice of law.

DATED: September 21, 1983.

Respectfully submitted,

GOLDSTEIN & PHILLIPS

By _____
ALVIN H. GOLDSTEIN, JR.

Attorneys for
Petitioner

V E R I F I C A T I O N

I, GARY LEE BATTAGLIA, am the Petitioner in this proceeding. I have read the foregoing PETITION FOR RECONSIDERATION and know the contents thereof. The same is true of my own knowledge.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on September 21, 1983, at San Francisco, California.

(Signed)

GARY LEE BATTAGLIA

83 - 1100

No.

In the Supreme Court

OF THE

United States

GARY LEE BATTAGLIA,
Petitioner,

vs.

THE COMMITTEE OF BAR EXAMINERS OF THE
STATE BAR OF CALIFORNIA,
Respondent.

SUPPLEMENTAL APPENDIX TO WRIT OF CERTIORARI

ALVIN H. GOLDSTEIN, JR.
GOLDSTEIN & PHILLIPS
A PROFESSIONAL CORPORATION
Three Embarcadero Center,
Suite 2280
San Francisco, CA 94111
Telephone: (415) 981-8855
Attorneys for Petitioner

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

BEFORE THE STATE BAR COURT

OF THE STATE OF CALIFORNIA

DISTRICT 4

In the Matter of the Application of	)	No. 81-M-22-SF
GARY LEE BATTAGLIA	)	FINDINGS OF FACT AND RECOMMENDATION
To Be Admitted to the Practice of Law	)	

The above matter having been set for hearing, pursuant to the Rule Regulating Admission to Practice Law in California, including a statement of the matters to be subject of the hearing (but not necessarily limited to those matters), and written notice of the hearing dated December 26, 1981 having been given, the above-entitled matter came on regularly for the first hearing on Friday, March 12, 1982 at 9:30 a.m. at the offices of the State Bar of California, 555 Franklin Street, San Francisco, California 94102.

Present at that first hearing and all subsequent hearings were Patricia A. Carson, Esq., Principal Referee; Carlo S. Fowler, Esq., Referee; and Margaret C. Gill, Esq., Referee. Also present at all of the hearings were the applicant, Gary Lee Battaglia; Alvin H. Goldstein, Jr., Esq., attorney for the applicant; and Robert G. Hulteng, Esq., Examiner for the State Bar Court.

The hearings were reported by Dave Davenport, C.S.R., with the firm of Wm. E. Henderschied, 41 Sutter Street, San Francisco, California.

In addition to the first hearing on March 12, 1982, the following hearings were held in this matter:

Monday, March 22, 1982

Friday, March 26, 1982

Monday, April 19, 1982

Tuesday, April 20, 1982

Wednesday, May 12, 1982

Thursday, May 20, 1982

Tuesday, June 1, 1982

Thursday, July 1, 1982

Friday, July 9, 1982

During the hearings oral testimony of the Applicant and numerous witnesses was taken. Documentary evidence was presented by the Applicant in the form of 51 exhibits. The State Bar presented 44 exhibits. Both sides prepared written briefs after closing arguments.

The Hearing Panel makes the following findings of fact:

FINDINGS OF FACT

1. The Applicant, GARY LEE BATTAGLIA, was born January 31, 1951 and has lived in and around Santa Rosa, California all of his life. He attended Santa Rosa Junior College over a three-year period and completed 70 units there. He received no degree. He attended Sonoma State College

for one semester and one summer. He began Lincoln University Law School January 1972. He graduated from that law school and passed the professional responsibility examination in May 1977. Applicant first took the bar examination in July 1977. In December 1977 he was notified that he had passed the multi-state portion, but failed the essay part. The second time he took the bar examination was February 1978. In May 1978 he was notified that he had failed the essay portion again. He took the bar examination a third time in July 1978. In December 1978 he was notified that he had passed the examination.

In 1979 there were extensive hearings as the result of a Notice of Hearing dated April 5, 1979, in which the specification was stated as follows:

> "Your possible involvement in prostitution, pimping, and/ or pandering activities."

In June 1979 a Hearing Panel of the State Bar Court held a hearing on the foregoing specifications and found that the "Applicant is not now an honest, fair person of candor and trustworthiness who will observe the fiduciary responsibility of an attorney under the laws of the State of California, and the United States or who has respect for the rights of others or for the judicial process" and the panel recommended that the Applicant not be admitted to practice.

On December 8, 1979 the full Committee of the Bar Examiners of the State Bar of California heard the Application of Gary Lee Battaglia, and recommended that his admission to practice be denied with the usual time for re-application shortened from two years to one year. Thus Applicant was authorized to re-apply in December 1980, presumably for good cause shown. [Rule X §104(a).]

In January 1981 Applicant filed a re-application. The Notice of Hearing and specification in the present hearings before this Hearing Panel resulted from that 1981 re-application. (See Applicant's Exhibit 49.)

The Notice of Hearing in the instant matter dated December 28, 1981 set forth the concern generally for the Applicant's moral character, to include, but not necessarily be limited to, the following:

> Facts and circumstances surrounding your 1980 bankruptcy, specifically the finding of the United States Bankruptcy Court for the Northern District of California, dated September 17, 1981, that certain credit card charges were non-dischargeable because you had no reasonable belief that you could pay for the purchase (in

the amount of $9,083.24) at any time they were incurred. [Emphasis added.]

2. In late 1977 the Applicant received an unsolicited application from Citibank in New York for a Visa card with a credit limit of $1,100.00. This was a promotional campaign by Citibank and was mailed out as a pre-approved credit card to certain selected groups without any specific credit check on the recipient of the invitation. The Visa card was applied for by Mr. Battaglia on December 2, 1977 and the card was received in January 1978. (State Bar Exhibit #6.) The Applicant had just received his notice that he had not passed the essay part of the bar examination and was preparing to take, and did take, the February 1978 Bar examination.

3. Applicant began to use the Visa card in January 1978 and during the first month of use he charged $1,544.80,

exceeding his credit limit by $444.80. The mailing address on the Citibank statements for January and February 1978 is Gary L. Battaglia, 999 Sonoma Avenue, Apt. 15, Santa Rosa, California 95404. The statements for March, April and May 1978 are missing. (State Bar Exhibit #6.) The statements from Citibank beginning June 1978 and continuing through October 1978 (when the Applicant ceased making any charges on the Visa card) were addressed to Gary L. Battaglia, c/o PY 332049 CA 95404, 2401 North Mayfair Road, Milwaukee, WI 53226. (Mikwaukee headquarters for Payco.) Later in 1979 there are some statements addressed to Gary L. Battaglia, c/o Steven Goodman, 575 Lexington Avenue, 15th Floor, New York, NY 10022. (See Applicant's Exhibits 1-A through 1-K.) Applicant only received the first statement from Citibank, and after he stopped using the Visa card in October 1978, he

returned the card the day it was demanded that he do so.

4. During the time the Applicant used the Visa card it appears from the numerous and various charges that he was "living off" the card. For example, on May 2, 1978 he charged lunch at the Captain's Table in Santa Rosa for $17.12 and left a $5.00 tip. (State Bar Exhibit #26.) On May 13, 1978, he charged "food" at the Tides in Bodega Bay in the amount of $9.75 and left a $5.00 tip. (State Bar Exhibit #27.) On May 30, 1975 he charged (presumably food) at Fiori Grace and Company in Santa Rosa in the amount of $7.25 and left a $5.00 tip (State Bar Exhibit #29) and on September 4, 1978 he charged again at Fiori Grace and Company food in the amount of $3.75 and left a tip in the amount of $5.00. (State Bar Exhibit #30.)

5. Applicant has worked as a clerk in retail stores where charge cards are used routinely. Except for the first month of use in January 1978 the Applicant never charged more than $50.00 on any single sales slip. (State Bar Exhibit #6.) The $50.00 is the merchant's floor limit, and anything over $50.00 needs telephone authorization.

6. Citibank assigned Applicant's Visa account to Payco General American Credits, Inc., a corporation, for collection.

7. Applicant made a total of three payments to Citibank on his account. Two payments of $10.00 each were made to Payco in June and July 1978. (See handwritten letter dated 7/15/78 - Battaglia to Payco. State Bar Exhibit #6.) A third payment of $35.00 was made prior to assignment of the claim to Payco.

8. Through its Mikwaukee, Wisconsin office, Payco sent demands for payment to Mr. Battaglia on May 10, 1978, May 23, 1978, June 9, 1978 and July 6, 1978. On July 11, 1978 the matter was referred to California counsel.

9. In a Complaint for Money dated November 27, 1978 entitled Payco of California, Inc., a California corporation, v. Gary L. Battaglia, being No. 100-613, Superior Court of California, County of Sonoma, Payco asked for $14,637.27 plus $3,659.31 for attorneys' fees if the matter proceeded on an uncontested basis, plus costs. (Applicant's Exhibit #3.)

10. Payco's amended Complaint for Money (as of Course C.C.P. §472) dated January 31, 1979 prayed for $19,327.47 principal, plus $3,659.31 attorneys' fees if the matter proceeded on an uncontested basis, plus costs. (Applicant's Exhibit #4.)

11. On March 12, 1980, on advice of his counsel at that time, Irv Piotrkowski, Esq., Gary L. Battaglia filed a Voluntary Case: Debtor's Petition in the United States Bankruptcy Court, for the Northern District of California, Case No. 1-80-00192, in which he listed among other items, the Payco debt in the amount referred to in paragraph 10 above. (State Bar Exhibit #1.)

12. On June 19, 1980, Payco filed in the United States Bankruptcy Court, Northern District, in Case No. 1-80-00192, a Complaint to Determine Nondischargeability of Debt seeking judgment for $19,329.49, plus interest at 7% from November 9, 1978, plus attorneys' fees in the sum of $3,659.31, if contested, and costs of suit. (State Bar Exhibit #2.)

13. On August 18, 1981, at the trial on the adversary proceeding to determine Nondischargeability of Debt, the Applicant

and his counsel, together with attorneys for Payco, stipulated that $9,083.24 was due Citibank on Applicant's Visa account for the months of January, February, June, July, August, September and October 1978. The Applicant and his counsel did not demand and were not offered any signed charge slips or documentation for this amount. The court found that "Defendant Battaglia had no reasonable belief that he could pay for the credit card purchases at a specific time." [Emphasis added.] (State Bar Exhibit #3.)

14. On August 24, 1981, the Applicant filed in the United States Bankruptcy Court for the Northern District of California an original Petition Under Chapter Thirteen. (State Bar Exhibit #5.)

15. Payco has actual signed charge tags totalling about $3,856.48, and has provided a schedule of charges 1-A through 1-K which total about $8,882.15.

Applicant does not deny these charges and virtually all listed charges are at places Applicant frequented. The problems that arose with Citibank's procedure and records keeping were numerous. The Visa-card was a fairly new merchandising effort on their part. The charge transactions were sent through various means to the Citibank center in New York where there were storage problems, computer error, and finally the originals were destroyed after being microfilmed.

16. On September 17, 1981, in the matter of Payco v. Battaglia in the United States Bankruptcy Court, Northern District of California, No. 1-80-00192, the Court made its order in favor of Payco holding that the principal sum of $9,083.24 is decreed to be nondischargeable pursuant to the provision of 11 U.S.C. 523(a) (2) (A). That section refers to "false pretenses, a

false representation, or actual fraud." (State Bar Exhibit #4.)

17. On June 17, 1982 in the United States Bankruptcy proceedings No. 1-80-00192 an Order Setting Aside Judgemtn of Nondischargeability and Dismissing Chapter 7 Proceedings was filed in the Payco v. Battaglia litigation. (Applicant's Exhibit #51.) (The Applicant has stipulated with Payco that he will pay Payco the amount of the signed Visa card charges, i.e., $3,856.48.)

18. Applicant has been married and was divorced in late 1975, but has always made regular support payments for his daughter.

19. During the period from late 1976 through 1978 Applicant had personal problems, did not work regularly and had relatively low income, but during that period he did make payments on debts incurred for

himself and others, including some significant debts of a nonessential nature.

20. The Applicant used monumental bad judgment in his choice of associates, the management of his financial affairs and his placement of priorities in his life generally during the period mid-1976 through 1978. He also appears to have received some inadequate legal representation along the way from friends and associates.

21. This Hearing Panel must accept as res judicata the findings of the prior Hearing Panel and Full Committee of State Bar Examiners in 1979, and has considered them.

22. This panel does not condone the conduct of Mr. Battaglia during the period mid-1976 through 1978. The panel has concluded, with considerable difficulty, that Applicant is rehabilitated. The panel believes that Applicant presently

possesses good moral character sufficient to entitle him to practice law as defined in Rule X, Section 102, of the Rule Regulating Admission to Practice Law in California. However, the panel notes with concern that in various financial matters referred to during the proceedings Applicant's financial judgment continues to be poor.

CONCLUSIONS AND RECOMMENDATIONS

The Applicant should be certified to practice law in the State of California forthwith.

Dated: November 17, 1982.

Patricia A. Carson, Esq.
Principal Referee

Carlo S. Fowler, Esq.
Referee

Margaret G. Gill, Esq.
Referee

THE COMMITTEE OF BAR EXAMINERS

OF THE

STATE BAR OF CALIFORNIA

In the Matter of the Application of	)	No. 81-M-22-SF
GARY LEE BATTAGLIA	)	FINDINGS AND CONCLUSION
To Be Admitted to the Practice of Law	)	

The Committee of Bar Examiners ("Committee") of the State Bar of California, while in formal session on Friday, February 11, 1983, received and considered the testimony of the applicant, Gary Lee Battaglia, and the oral arguments of his counsel and the Examiner for the State Bar.

Pursuant to applicant's motion, the Committee reopened the hearing on Friday, April 30, 1983, for the exclusive purpose of considering those portions of the record which were not before the Committee

at the time of the February 11, 1983 hearing.

FINDINGS OF FACT

1. On November 22, 1982, a hearing panel of the State Bar Court of the State Bar of California filed its report and recommendation in reference to applicant Gary Lee Battaglia, concluding "with considerable difficulty that the applicant is rehabilitated" and recommending that the applicant be certified to practice law in the State of California.

2. The Division of Trial Counsel of the State Bar of California filed a timely application to have the matter set for hearing before the Committee pursuant to the provisions of Rule X, Section 103(b).

3. Pursuant to the provisions of Rule X, Section 104(b), the Committee ordered a hearing before it. Notice

having been given, said hearing convened on February 11, 1983.

4. On February 15, 1983, the Committee, through its Executive Director, informed applicant's counsel that the Committee had determined that applicant did not qualify for admission to practice law under Article IV, Section 6060 of the Business and Professions Code and Rule X of the Rules Regulating Admission to Practice Law in California and that, therefore, the applicant would not be certified for admission to the Bar of the State of California.

5. On February 16, 1983, applicant filed a motion asking the Committee to vacate its decision of February 11, 1983 and to reopen the hearing. The motion was based on failure to comply with the requirements of Rule X, Section 103(f) in that a full transcript of the hearing before the hearing panel of the State Bar

Court had not been available at the time of the February 11, 1983 hearing.

6. On March 26, 1983, the Committee granted applicant's motion to reopen the hearing for the limited purpose of considering those portions of the record which had not been available at the February 11, 1983 hearing. Notice having been given, the Committee convened for further hearing on April 30, 1983.

7. Upon consideration of the record and the testimony given by the applicant, the Committee adopts and incorporates herein by reference findings 1 through 21, inclusive, contained in the Findings of Fact and Recommendation of the hearing panel issued on November 17, 1982 and filed on November 22, 1982.

8. During the period of time between January 1978 and October 1978, when he was "living off" the Visa credit card, applicant Gary Lee Battaglia had no reasonable

belief that he could pay for the credit card purchases at a specific time.

9. The applicant's judgment in various financial matters referred to during the proceedings before the hearing panel and before the Committee continues to be poor.

10. The applicant was less than candid when testifying before the Committee on February 11, 1983.

11. The applicant has failed to demonstrate that he is rehabilitated and presently possesses the good moral character required by Business and Professions Code Sections 6060 and 6062 and Rule X of the Rules Regulating Admission to Practice Law in California.

CONCLUSION

Gary Lee Battaglia shall not be certified to the Supreme Court of the State

of California for admission to practice law in the State of California.

Dated: May 20, 1983.

Martin R. Glick
Chair, The Committee
of Bar Examiners

NO. 83-1100

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

GARY LEE BATTAGLIA,

Petitioner,

vs.

THE COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of
The State of California

RESPONDENT'S BRIEF IN OPPOSITION

HERBERT M. ROSENTHAL
TRUITT A. RICHEY, JR.
RICHARD J. ZANASSI
555 Franklin Street
San Francisco, California 94102
Telephone: (415) 561-8200
Attorneys for Respondent

TRUITT A. RICHEY, JR.
Counsel of Record for Respondent

ISSUE PRESENTED

Whether denial by the California Supreme Court of the issuance of a writ of review to provide plenary review to a bar applicant whom the Committee of Bar Examiners, after appropriate hearing and with decision, has refused on moral character grounds to certify for admission to practice law, constitutes a denial of due process and equal protection, even though the court in the exercise of its judicial discretion following review of the record before it may have determined that no substantial issues were presented that required full briefing on the merits, oral argument and a written opinion.

SUBJECT INDEX

TABLE OF AUTHORITIES

(Cont'd.)

TABLE OF AUTHORITIES
(Cont'd.)

(Cont'd.)

TABLE OF AUTHORITIES
(Cont'd.)

NO. 83-1100

In The
SUPREME COURT OF THE UNITED STATES

October Term 1983

GARY BATTAGLIA,

Petitioner,

vs.

THE COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the Committee of Bar Examiners of The State Bar of California, respectfully requests that this court deny the petition for writ of certiorari seeking review of the California Supreme Court determination in Battaglia v.

State Bar of California, Committee of Bar Examiners (Cal. Sup. Ct., Docket No. S.F. 24593).

The California Supreme Court without opinion denied petitioner's petition for writ of review by order filed September 8, 1983, and subsequently denied petitioner's petition for rehearing by order filed on October 5, 1983.

RESPONDENT'S STATEMENT

In California admission to the practice of law is an exercise of one of the inherent powers of the California Supreme Court. Merco Constr. Engineers, Inc. v. Municipal Court, 21 Cal.3d 724, 727-729 (1978); Stratmore v. State Bar, 14 Cal.3d 887, 889 (1975); Brydonjack v. State Bar, 208 Cal. 439, 443 (1929); People v. Turner, 1 Cal. 143, 150 (1850); see California Constitution, article VI, section 1.

To assist the Supreme Court in the administration of the admission process, the Board of Governors of the State Bar, pursuant to California Business and Professions Code sections 6046 and 6046.5, appoints a Committee of Bar Examiners. This committee, as the administrative arm of the California Supreme Court in admissions matters, has primary responsibility for the bar examination process. In re Admission to Practice Law, 1 Cal.2d 61, 67 (1934); Chaney v. State Bar, 386 F.2d 962, 966 (1967).

In that regard, the Committee has the power to (a) examine all applicants for admission; (b) administer the requirements for admission to practice; and (c) certify to the California Supreme Court for admission those applicants who fulfill the requirements. California Business & Professions Code

sections 6060 and 6064; see also sections 6060.5 and 6062; California Rules of Court, rule 952(c); rule 1, section 1, Rules Regulating Admission to Practice Law in California. One of the requiremlents for admission to practice law is that the applicant be of good moral character. California Business & Professions Code section 6060(b). All acts of the Committee are subject to review by the California Supreme Court. California Rules of Court, rule 952(c). The Committee's actions are mere recommendations and are not binding on the court. Siegel v. Committee of Bar Examiners, 10 Cal.3d 156, 173 (1973); Greene v. Committee of Bar Examiners, 4 Cal.3d 189, 191 (1971); Bernstein v. Committee of Bar Examiners, 69 Cal.2d 90, 97 (1968).

Upon its independent review, the court may uphold the administrative determination of the Committee, Greene v. Committee of Bar Examiners, 4 Cal.3d 189 (1971), or its may reverse that determination, Siegel v. Committee of Bar Examiners, 10 Cal.3d 156 (1973).

In California the trial of bar applicant moral character matters is conducted before a hearing panel of the State Bar Court. Rule X, section 102(e) of the Rules Regulating Admission to Practice Law in California (Rules Regulating Admission). The establishment of State Bar Court hearing panels are provided for in the Rules of Procedure of The State Bar of California (Rules of Procedure). The specific Rules of Procedure applicable to bar admission matters are delineated

in Rule X, section 102(e) of the Rules Regulating Admission.*

At the hearing panel "trial" the applicant may be represented by counsel (as petitioner was), may present evidence of his moral character, and may confront and cross-examine adverse witnesses. Documentary evidence is introduced and a transcript is made of the proceedings. Thereafter, the hearing panel makes findings of fact and a recommendation to the Committee of Bar Examiners as to whether the applicant has the requisite moral character. The findings and recommendation of the hearing panel are

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* The Rules Regulating Admission are published in volume 23, West's Annotated California Codes (Rules of Court) part 2, page 478, et seq. The Rules of Procedure are published in volume 23, West's Annotated California Codes (Rules of Court), part 2, page 590, et seq.

binding upon all parties unless within 45 days the applicant, the State Bar examiners or the Committee itself elects to have a hearing before the Committee. Rule X, section 103, Rules Regulating Admission. The hearing before the Committee consists of oral argument on the record adduced before the hearing panel and any memoranda timely filed. In addition, the applicant may make a statement under oath and "will be required to respond under oath to questions from the Committee." Rule X, section 103(f)(2).

Petitioner passed the California bar examination in July 1978. Petitioner has subsequently twice been denied certification to practice law by the Committee of Bar Examiners of The State Bar of California.

Petitioner's first moral character proceeding commenced soon after he

passed the bar examination in 1978. In June 1979, after extensive hearings before a hearing panel of the State Bar Court, the hearing panel concluded that the "applicant is not now an honest, fair person of candor and trustworthiness who will observe the fiduciary responsibility of an attorney under the laws of the State of California, and the United States, or who has respect for the rights of others or in the judicial process."

On December 8, 1979, the full Committee of Bar Examiners of the State Bar of California, upon the application of petitioner, reviewed the record in that first proceeding and recommended that his admission to practice law be denied with the usual time for reapplication shortened from two years to one year. Rules Regulating Admission, rule X, section 104(a). Petitioner did not

seek review of that decision. The Committee's decision was based substantially on findings that petitioner made untruthful statements to State Bar investigators concerning his knowledge of and meetings with persons involved in illegal activities.

In January 1981, petitioner applied for certification a second time. However, in March 1980, petitioner had filed for bankruptcy in the United States District Court. In order to determine if petitioner was now rehabilitiated, and because of events occuring and brought to light in the bankruptcy proceeding, a further investigation of petitioner's moral character was undertaken. There was a finding in the bankruptcy proceeding that certain credit card charges of petitioner were nondischargeable because "[petitioner] had no reasonable

belief that he could pay for the purchases at a specified time." The credit card debts were incurred in 1978. However, they were not known of by the State Bar until 1981, and were not considered by the State Bar until these second proceedings in 1982-1983.

On November 17, 1982, after extensive hearings, the hearing panel filed its findings and decision in which it recommended that petitioner be certified to practice law. However, in arriving at its recommendation it was specifically stated that "this panel does not condone the conduct of Mr. Battaglia during the period mid-1976 through 1978. The panel has concluded, with considerable difficulty, that Applicant is rehabilitated." (Emp. added.)

The volunteer examiner for the State Bar sought review of the hearing

panel recommendation, and on February 11, 1983, the Committee heard the testimony of petitioner and the oral arguments of counsel for both parties.

Pursuant to petitioner's motion, the Committee reopened the hearing on April 30, 1983 for the exclusive purpose of considering portions of the record not before the Committee during the February 1983 session.

On May 20, 1983, the Committee filed its decision. It adopted Findings 1 through 21 in the Findings of Fact and Recommendation of the hearing panel (issued November 27, 1982), and further found that petitioner failed to demonstrate good moral character as required by Business and Professions Code sections 6060 and 6062, and rule X of the Rules Regulating Admission to Practice Law in

California. The Committee also found, "the applicant was less than candid when testifying before the Committee on February 11, 1983."

On July 22, 1983, petitioner filed a petition for review with the California State Supreme Court. The petition was denied without opinion by the court on September 8, 1983. Subsequently, on September 21, 1983, petitioner filed a petition for reconsideration which was denied by the court on October 5, 1983.

Petitioner's petition for writ of certiorari to this court followed.

REASONS WHY THE WRIT SHOULD BE DENIED

A review on writ of certiorari is not a matter of right, and will be granted only when there are special and important reasons therefore. Rule 17,

Rules of the Supreme Court of the United States.

Rule 17 sets forth non-exclusive guidelines that indicate the character of the reason that will be considered by the court in determining whether a writ of certiorari will be granted. The present case clearly does not fall within those guidelines.

Rule 17.1(a) is inapplicable because this particular section pertains to decisions by the federal court of appeals.

Likewise, the California Supreme Court has not decided a federal question in a way that conflicts with the decision of another state court or a federal court of appeals. Rule 17.1(b) is not applicable.

Finally, this case does not come within the guidelines of rule 17.1(c), although petitioner asserts that the

decision of the California Supreme Court to deny him admission to the practice of law denied him due process and the equal protection of the law. It is the position of the Committee that petitioner was not denied due process or equal protection. The decision of the Committee to deny certification to petitioner was made after petitioner was accorded all constitutional rights.

Petitioner incorrectly asserts that by refusing to issue its writ of review the Supreme Court of California refused to provide judicial review of "an administrative agency's" denial of his certification to practice law. This is erroneous because the Supreme Court of California considers the merits of every petition for review filed by unsuccessful bar applicants. It is only those petitions which after

analysis are perceived by the court to not involve questions of substance requiring plenary consideration, with full briefing on the merits and oral argument, that the court resolves the merits of the petition on the basis of the preliminary papers by order denying the issuance of the court's writ.* See Konigsberg v. State Bar of California, 353 U.S. 252, 254-258, 77 S.Ct. 722, 723-726 (1957).**

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* This practice is, of course, not unlike this court's summary disposition on the merits of both appeals and certiorari cases not perceived to present questions of substance. See rules 16.7 and 23.1, Rules of the Supreme Court of the United States.

** As this court noted in Konigsberg, 353 U.S. at 254, 77 S.Ct. at 724: "In considering actions of the Committee of Bar Examiners the California Supreme Court exercises original jurisdiction and is not restricted to the limited review made by an appellate court. For

[Footnote cont'd on next page.]

California has long exceeded the standard of due process required in bar admission matters as set forth in Willner v. Committee on Character and Fitness, 373 U.S. 96, 83 S.Ct. 1175,

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[Footnote cont'd. from preceding page.]

example, that court declared in In re Lacey, 11 Cal.2d 699, at page 701, 81 P.2d 935, at page 936: 'That this court has the inherent power and authority to admit an applicant to practice law in this state or to reinstate an applicant previously disbarred despite an unfavorable report upon such application by the Board of Bar Governors of the State Bar, we think is now well settled in this state. ... The recommendation of the Board of Bar Governors is advisory only..... [T]he final determination in all these matters rests with this court, and its powers in that regard are plenary and its judgment conclusive.'" See also: California Business & Professions Code, section 6066; California Rules of Court, rule 952(c) [formerly rule 59(b) as discussed in Konigsberg]; Rules Regulating Admission to Practice Law in California, rule I, sections 1 and 11 (see Cal. Bus. & Prof. Code (West) foll. § 6068).

1181 (1963), which held that a bar applicant was denied due process when he was denied admission to the bar by the court without a hearing on the charges against him before either the committee or the court. A concurring opinion by Mr. Justice Goldberg stated:

> "The constitutional requirements in this context may be simply stated: in all cases in which admission to the bar is to be denied on the basis of character, the applicant, at some stage of the proceedings prior to the denial, must be adequately informed of the nature of the evidence against him and be accorded an adequate opportunity to rebut this evidence." 373 U.S. at 107, 83 S.Ct. at 1182.

In the present proceeding it is clear that prior to the California Supreme Court denial of his admission to practice law, petitioner was accorded several days of hearing, was represented by very competent counsel,

knew of all the evidence presented against him, and presented a substantial amount of evidence on his own behalf.

The hearing panel filed a decision with findings, and concluded on the basis of this record before it that petitioner was rehabilitated, and recommended his certification for admission. However, the panel's conclusion as to petitioner's rehabilitation was "reluctant."

The Committee had the same entire record before it. In addition, petitioner testified before the Committee and answered questions under oath. The Committee filed a unanimous decision in which it adopted 21 of the findings of the hearing panel. However, the Committee found that petitioner in his testimony before it was less than

candid.* Petitioner's lack of candor was the same deficiency of which he was found culpable of in the earlier moral character proceeding.

The Committee of Bar Examiners and The State Bar of California act as the administrative arm of the California Supreme Court in matters pertaining to the admission and discipline of lawyers. Chronicle Publishing Co. v. Superior

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* State Bar Court hearing panel referees sit principally in attorney discipline matters. Their exposure to admission moral character matters is often not extensive. On the other hand, the Committee of Bar Examiners reviews every moral character case, and is certainly more experienced in concluding whether on a given set of findings an applicant is qualified to be certified. Indeed, the Committee and not the hearing panel is charged by statute with making the State Bar's recommendation to the Supreme Court as to whether an applicant is morally qualified for admission. Business & Professions Code, section 6046. This is so whatever weight is given to the factual findings of the hearing panel.

Court, 54 Cal.2d 548, 566 (1960). The proceedings before the State Bar Court and the Committee of Bar Examiners were actually proceedings before the California Supeme Court. The State Bar Court and the Committee decisions are only recommendations. The actual decision as to whether an applicant is to be admitted is made by the Supreme Court, although the recommendations of the Committee are entitlted to great weight.

In arriving at its determination the Supreme Court may use any or all of the State Bar record. It is always available for the court. However, we are aware of no rule of this court or any other court that would require the Supreme Court of California to grant plenary review with full briefing, oral argument and written opinion to each and every applicant who, because of

moral character or for whatever other reason, is denied certification to practice law by the Committee of Bar Examiners. There was no denial of due process.

Petitioner's contentions regarding denial to him of equal protection are equally without merit. The same contentions could be made by anyone who is denied certiorari by this court or review by any other court where such review is discretionary. If, after appropriate review of that part of the record as it deems necessary, the Supreme Court of California believes the recommendation of the Committee regarding a bar applicant is wrong, it will order review with the resulting briefing, oral argument and opinion. Petitioner's presentation did not persuade the California Supreme Court he was in the category of wronged

applicants, and his petition was treated in the same manner as other applicants who have failed to convince the court that the Committee's recomendation was wrong. This does not violate the Constitution.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Dated: February 9, 1984

Respectfully submitted,

HERBERT M. ROSENTHAL
TRUITT A. RICHEY, JR.
RICHARD J. ZANASSI

Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the Supreme Court of the United States, certifies that three copies of the RESPONDENT'S BRIEF IN OPPOSITION have been served on counsel of record for the party herein by mailing same, first-class postage prepaid, this the 10th day of February 1984, as follows:

Alvin H. Goldstein, Jr.
Goldstein & Phillips
Suite 2280
Three Embarcadero Center
San Francisco, California 94111

All parties required to be served have been served.

TRUITT A. RICHEY, JR.

555 Franklin Street
San Francisco, California 94102
(415) 561-8200

No. 83-1100

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

GARY LEE BATTAGLIA,

Petitioner,

VS.

THE COMMITTEE OF BAR EXAMINERS OF THE STATE OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of The State of California

PETITIONER'S REPLY BRIEF

ALVIN H. GOLDSTEIN, JR.
GOLDSTEIN & PHILLIPS
A Professional Corporation
Three Embarcadero Center
Suite 2280
San Francisco, CA 94111
Telephone: (415) 981-8855
Attorneys for Petitioner

PETITIONER'S REPLY BRIEF

Table of Authorities Cited

Cases

IN THE SUPREME COURT OF THE

UNITED STATES

GARY LEE BATTAGLIA,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	NO. 83-1100
THE COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA,	)	
	)	
	)	
Respondent.	)	
	)	

PETITIONER'S REPLY BRIEF

Respondent's assertion that "the Supreme Court of California considers the merits of every petition for review filed by unsuccessful Bar applicants" (Opp.Br., p.14) is meaningless, in the context of the concession that "in arriving at its determination, the Supreme Court may use any or all of the State Bar record." Opp.Br.,p.20; emphasis added. Presumably, this selective approach would permit the

state court to ignore the record completely or to use only that portion supporting the Committee's recommendation. That the record may be "always available" does not satisfy the state court's acknowledged "duty to undertake an independent examination of the evidence in cases of this kind" Siegel v. Bar Examiners, 10 Cal.3d 156,160 (1973), and to resolve all reasonable doubt in an applicant's favor. Id. at 173.

Respondent's suggestion that plenary review is not required as a matter of due process (Opp.Br.,p.20) ignores the fact that substantial and fundamental interests are involved. Respondent's position does not square with decisions of this court, Boddie v. Connecticut, 401 U.S. 371, 375 (1971); Cf. Ortwein v. Schwab, 410 U.S. 656 (1973) ("fundamental interest" found lacking), or decisions of the California Supreme Court in Hall v. Committee of Bar

Examiners, 25 Cal.3d 730,734 (1979); Siegel v. Committee of Bar Examiners, 10 Cal.3d 156,160,173 (1973); Hallinan v. Committee of Bar Examiners, 65 Cal.2d 447,451 (1966).[1/]

It was this Court's certainty that California provided plenary review that inspired Mr. Justice Black to note in Konigsberg v. State Bar of California, 353 U.S. 252,254 (1956), that the California Supreme Court "exercises original

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1/ Hall: " . . . the independent examination of the record which we must undertake in reviewing a certification denial . . . "

Siegel: "In accordance with our duty to undertake an independent examination of the evidence in cases of this kind, we proceed to a consideration of the record * * * * this court independently examines and weighs the evidence and passes upon its sufficiency. . . . All reasonable doubts are to be resolved in [petitioner's] favor."

Hallinan: " . . . examines and weighs the evidence and passes upon its sufficiency [and that] any reasonable doubts encountered in the making of such an examination should be resolved in favor of the accused."

jurisdiction and is not restricted to the limited review made by an appellate court" and, citing California law, that "its powers in that regard are plenary and its judgment conclusive." (Emphasis added)

Respondent argues that the proceedings before the State Bar Court (an administrative tribunal) and the Committee of Bar Examiners "were actually proceedings before the California Supreme Court" (Opp.Br.,p.20; emphasis added), suggesting that petitioner has already had his day in court. Yet, at page 3 of the brief, respondent asserts that the Committee is "[t]he administrative arm of the California Supreme Court in admissions matters," and concedes that "[t]he actual decision as to whether an applicant is to be admitted is made by the Supreme Court . . . " Opp. Br.,p.20; emphasis added. Thus, judicial review must occur in the California Supreme Court, or not at all.

The assertion that judicial review takes place absent the complete record relied upon by the administrative agency ("In arriving at its determination the Supreme Court may use any or all of the State Bar record." Opp. Br.,p.20), is a view that is not discernible in any of the California cases. The express holding in those cases is to the contrary.

Petitioner is not only denied judicial review, but he is denied meaningful access to the one body that can make an "actual decision," i.e., the California Supreme Court.

Respondent's brief is laden with innuendo suggesting that the California Supreme Court has reviewed the record, e.g., "in the exercise of its judicial discretion following review of the record before it . . . " Opp.Br.,p."i." Yet, a fair reading of respondent's argument justifies the conclusion that petitioner

has not had the benefit of independent judicial review, involving "an examination of the record."

Finally, we address respondent's assertion that the State Bar Court's conclusion and recommendation that petitioner should be admitted forthwith is "reluctant." Opp.Br.,p.18. Nowhere, in the State Bar Court's findings, does the word "reluctant" appear. That is respondent's choice of words and petitioner does not believe that it is a synonym for the phrase used in the State Bar Court findings--i.e., "with considerable difficulty." Supp.App. SBC.Finding 22,p.16. A decision may be reached "with considerable difficulty" that is not "reluctant." There is certainly nothing equivocal about the State Bar Court's conclusion and recommendation that "the applicant should be certified to practice law in the State of California forthwith." (Supp.App. SBC. Findings, p.17)

Respondent seizes upon the phrase "with great difficulty" as if to justify denial of plenary review. This only underscores the need for plenary review. The latent ambiguity of that phrase, as well as the Committee's finding, without specification, that "applicant was less than candid when testifying before the Committee" (Supp.App.CBE.Finding 10,p.5), are appropriate concerns on judicial review.

It is petitioner's contention that the respondent Committee has acted arbitrarily and capriciously and that plenary review by a court will establish that there is no legal basis for refusing petitioner's admission to the Bar. Since, as respondent argues, "the actual decision as to whether an applicant is to be admitted is made by the Supreme Court" (Opp.Br.,p.20; emphasis added) and "Committee decisions are only recommendations" (Ibid), then, as a matter of fundamental fairness, the

"decision" here should only be made by a judicial body after plenary review, i.e., examination of the record, weighing the evidence and resolution of reasonable doubt in favor of the applicant.

That is the process the California Supreme Court says it "must undertake in reviewing a certification denial," and it should do so here.[2/]

[2/] The basic unfairness in not requiring plenary review is illustrated by respondents' opposition which attempts to argue evidence to this court without citation to any record. (Opp.Br.,pp.8-9) The "independent" review required in Bar admission cases cannot be carried out unless the court has the full record before it. Without the record, Committee "findings" cannot be assessed "independently" in accord with any objective standard. The result will be totally subjective, subject to the whim and caprice of a reviewer who may not even be a judge. The one judge summary denial of a petition for review does not mean that the petition has been read by the court.

We ask for nothing more, and we are constitutionally entitled to nothing less.

DATED: February 21, 1984.

Respectfully submitted,

GOLDSTEIN & PHILLIPS

By _____
ALVIN H. GOLDSTEIN, JR.
Attorneys for Petitioner